IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17/03/2004

CORAM

THE HONOURABLE MR.JUTICE M. CHOCKALINGAM

SECOND APPEAL NO.1232 OF 1993

1. Mari Udayar
2. Govindan
3. Jagannathan .. Appellants

-Vs-

1. Ramasami Udayar (dead)
2. Pappal alias Mayyammal
3. Pannerselvam
4. Ramalingam .. Respondents

This second appeal is preferred under Section 100 of CPC against the judgment and decree of the learned I Additional District Judge, Salem dated 10.10.1988 made in AS No.139 of 1986 modifying the preliminary decree and judgment of the learned Additional Subordinate Judge, Salem dated 8.7.1986 made in OS No.708 of 1982.

!For Appellants : Mr.Vijayaraman, SC
for Mr.P.Jagadeesan

^For Respondents : Mr.K. Ramanraj
for M/s. R.M.Krishnaraja

:JUDGMENT

The defendants in a suit for partition, who are aggrieved over the modification of the judgment of the trial court by the first appellate court, are the appellants herein.
2. The following short facts are noticed in the pleadings of the parties.
There are A and B schedules of properties. A schedule measuring 6 acres is comprised in S.No.10/1 and B schedule measuring 39 cents comprised in S.No.8/5. The plaintiff claims 1/3rd share in A schedule and 2/3rd share in B schedule on the basis of a sale deed dated 1 3.9.1981 from one Sadachi Ammal. The first defendant and one Kathappa Udayar and one Periyathambbi were brothers, of whom Kathappa Udayar was the husband of Sadachiammal, whose son was Alagappa. Since Periyathambi orally relinquished his 1/3rd share, the first defendant and Kathappa became entitled to equal share in A schedule.

The B schedule property was the exclusive property of Kathappa Udayar, who in turn executed a settlement deed in respect of 1/2nd share in the schedule and the entire B schedule on 5.4.1951 in favour of his wife Sadachi and his minor son Alagappa. Alagappa died ten years ago leaving behind him his mother Sadachi, wife Pappathi and daughter Jayakodi. Sadachi was entitled to half share under the settlement as settlee and 1/3 rd share in B schedule. The third defendant is a purchaser from Pappathi and Jayakodi of their share and therefore they are co-owners. Sadachi agreed to sell her 1/3rd and 2/3rd shares to one Velusamy and one Kandasamy on 6.5.1981 for a sum of Rs.18100/- of which Rs.5000/- was received by way of advance. The balance of Rs.13000/- was paid by the plaintiff on 30.9.1981. Before registration of the sale deed dated 30.9.1981, Sadachi had executed a sale deed of the suit property in favour of the third defendant for Rs.17000/- on 14.10.1981 and the deed was registered on the same date. The plaintiff has executed a Muchalika in favour of the mediator Ramasamy on 6.11.1981 setting out those aspects and admitting Rs.5000/- paid by him to Sadachi. Hence, the suit for partition with a prayer for preventive injunction restraining the defendants from cutting the trees in the suit properties.

3. The said suit was contested by the third defendant by filing a written statement, which was adopted by the defendants 1 and 2, stating that the plaintiff and the defendants are not co-owners; that the settlement deed dated 6.5.1981 by Kathapopa to his wife and minor son is void in law and for a co-partner could not settle his undivided share or any share of the joint family property; that the plaintiff took the registered sale deed from mediator on executing a muchalika on 6 .11.1981 attested by Velusamy and Kandasamy; that there was a division in the defendants' family on 12.6.75; that Velusamy, Kandasamy and Sadachi attempted to trespass and disturb the possession of the defendants 1 and 2 and so the defendants 1 and 3 filed OS No.1734 of 1981 before the District Munsif, Salem and the suit was decreed as prayed for, against which no appeal was filed and it became final and conclusive, and as such, the contention of the plaintiff are barred by res-judicate, and hence, the suit was to be dismissed.

4. The trial court framed necessary issues, tried the suit and decreed the same holding that the sale deed by Sadachi to the third defendant during the subsistence of the sale deed in favour of the plaintiff was invalid; that the muchalika was false; that possession was given to Kandasamy and Velusamy and the plaintiff is entitled to partition with the consequential relief of injunction, and thus, preliminary decree for partition was granted as prayed for. Aggrieved, the defendants took it on appeal and the first appellate court, after hearing the rival submissions and the scrutiny of the materials available, allowed the appeal and modified the preliminary decree originally granted by the trial court. Aggrieved, the defendants have brought forth this second appeal.

5. At the time of admission, the following substantial question of law was formulated by this Court for consideration:

"Whether the lower appellate court is right in holding that the Sadachi was entitled to 7/36 shares in the suit property?"

6. Heard the learned counsel for the appellants and also the counsel appearing for the respondents on those contentions.

7. Admittedly,the property originally belonged to one Alagappa Udayar, who had three sons, namely, Kathappa Udayar, the husband of Sadachi,

Mari Udayar, the first defendant and Periathambi alias Alagappa Udayar. Kathappa's son was Alagappa and daughter Mariammal. Son Alagappa Udayar died about 20 years ago leaving his widow Pappathi and his daughter Jayakodi. Mari Idayar died leaving the first defendant. the sons of the first defendant are the defendants 2 and 3 of whom the third defendant purchased the shares of Pappathi and Jayakodi. Periathambi died, before which he had released, orally, his rights in favour of his brothers Kathappa Udayar and the first defendant. Rival claims were made as to the title of the property.

8. According to the plaintiffs' side, the plaintiff purchased under Ex.A.3 sale deed dated 30.9.1981 executed by Sadachi Ammal in respect of 1/3rd share and 2/3rd share in A and B schedule, respectively. Sadachi Ammal executed the sale deed on the strength of the settlement deed executed by her husband in her favour. The first appellate court has found that the settlement deed executed by the husband of Sadachi Ammal in respect of the joint family property and that too without the consent of the other co-parcenors was void abinitio and rightly too. The first appellate court has also found that while the settlement deed executed in favour of Sadachi Ammal was not valid, she was entitled to the share, which devolved upon her by operation of law and to that extent, the plaintiff was entitled to have the relief of partition pursuant to the sale deed executed in his favour by Sadachi Ammal dated 30.9.1981.

9. What is challenged before this Court by the defendants is exactly the modification made by the first appellate court in its judgment. What are all contended by the appellants' side is that the sale deed executed by Sadachi Ammal under Ex.A.3 was dated 30.9.1981, but the document was compulsorily registered on 19.11.1981. It is further added that the right under the agreement for sale entered into between Sadachi Ammal on one side and the plaintiff on the other side on 6.5.19 81 was abandoned by way of the execution of Muchalika under Ex.B.25 dated 6.11.1981. But the property was conveyed by Sadachi Ammal in favour of the third defendant under Ex.B.24 on 14.10.1981 itself. The abandonment of the right under the agreement for sale by way of the Muchalika under Ex.B.25 and the sale deed compulsorily registered on 19.11.1981 would clearly indicate that the finding of the first appellate court that the plaintiff was entitled to have the relief to an extent of Sadachi Ammal's share, which would devolve upon her by operation of law, under the sale deed Ex.A.3 is erroneous and has got to be set aside. The above contention of the learned counsel for the appellants has got to be discountenanced for two reasons that even before the first appellate court, the appellants have clearly conceded that Ex.A.3 was to be given precedence, as it had already conveyed the share of Sadachi Ammal and the said Sadachi Ammal had no right to convey Ex.B.24. The trial court, in extenso, has discussed and found that Ex.B.25 Muchalika was a false one, and hence, it cannot be taken into account. This Court is able to see suffice force in the contention put forth by the respondents' side. The first appellate court has categorically pointed out in its judgment that the appellants' side has conceded that Ex.A.3 has to be given precedence, since it had already conveyed the share of Sadachi Ammal, and thus, Sadachi Ammal had no right to convey under Ex.B.24, and apart from that insofar as the Muchalika, the trial court, after discussing the evidence on hand, has found that Ex.B.25 Muchalika was a false one and the said finding was not disturbed by the first appellate court.

10. In view of the fact that the appellants had conceded before the

first appellate court that Ex.A.3 would prevail over the other document and it has already conveyed the share of Sadachi Ammal in favour of the plaintiff and also in view of the finding of the trial court that Ex.B.25 was a false one and the said finding was also not disturbed by the first appellate court, this Court is unable to agree with the contention of the learned counsel for the appellants' side. Hence, the question framed, at the time of admission, is answered in favour of the respondents.

11. In the result, this second appeal fails and the same is dismissed, leaving the parties to bear their costs.

Index : Yes
Internet : Yes

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To
1. I Additional District Judge, Salem.
2. Additional Subordinate Judge, Salem.
3. The Record Keeper, VR Section,
High Court, Madras

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